
SEPARATING FACT FROM FICTION: POLITICAL ACTIVITIES REVISITED

*By Terrance S. Carter and Linsey E.C. Rains**

A. INTRODUCTION

It has been over three years since the Honourable Joe Oliver, then Minister of Natural Resources, fired the proverbial shot across the bow in the political activities debate by releasing his unprecedented “open letter” on January 9, 2012. The letter did not explicitly target registered charities, but rather “environmental and other radical groups” threatening “to hijack” the regulatory system “to achieve their radical ideological agenda” and delay government supported projects “to undermine Canada’s national economic interest.”¹ However, given the timing of his comments, the House of Commons Standing Committee on Finance’s (“Standing Committee”) December 15, 2011 announcement of its study on charitable giving, as well as other public statements by the federal government, many in the sector and media speculated that the federal government was utilizing Canada Revenue Agency (“CRA”) to take aim at environmental charities under the guise of reviewing the political activities rules that apply to all registered charities. This speculation was fuelled in great part by the passing of Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures* (“Budget 2012”).²

One adverse consequence of these statements and the resulting speculation is the difficulty in separating fact from fiction in accurately assessing how the federal government’s increased focus on registered

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¹ The Honourable Joe Oliver, Minister of Natural Resources, “An open letter from Minister Oliver on our energy markets and the regulatory process” (9 January 2012), online: <<http://www.nrcan.gc.ca/media-room/news-release/2012/1911>>.

² Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures*, 1st Sess, 41st Parl, 2012, (assented to 29 June 2012), SC 2012, CHAPTER 19.

charities' political activities is really impacting the sector. Allegations of political interference and administrative unfairness are a serious business that should not be blindly accepted or easily ignored. However, the intersection of registered charities and political activities is not a new phenomenon and a clearer understanding of the legislative framework and regulatory history is important to appreciate the current issues. Accordingly, this *Charity Law Bulletin* ("Bulletin") refers to a number of secondary and primary sources in order to add some needed background and context to the current debate and clarify the publicly documented facts so far. In particular, the Bulletin reviews the pre-Budget 2012 political activities climate, key Budget 2012 provisions, CRA's implementation of Budget 2012, and recent statements from CRA and the Minister of National Revenue ("Minister") to help readers differentiate between the federal government's political agenda and the public response of the federal regulator.

B. BACKGROUND

After publication of the above referenced comments by the Minister of Natural Resources on January 9, 2012, the launch of an inquiry into the foreign funding of charities by the Honorable Senator Nicole Eaton,³ and the release of the federal government's *Building Resilience Against Terrorism: Canada's Counter-terrorism Strategy* ("Counter-terrorism Strategy")⁴ in February of 2012, offered little to ease sector concerns. In addition to identifying specific registered charities and their funders, Senator Eaton made the following comments regarding the rationale behind the inquiry:

There is political manipulation. There is influence peddling. There are millions of dollars crossing borders masquerading as charitable foundations into bank accounts of sometimes phantom charities that do nothing more than act as a fiscal clearing house. They dole out money to other charities without disclosing what the money is for. This inquiry is about how billionaire foreign foundations have quietly moved into Canada and, under the guise of charitable deeds, are trying to define our domestic policies.⁵

³ *Debates of the Senate*, 41st Parl, 1st Sess, Vol 148 (2 February 2012), online: <http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/047db_2012-02-02-e.htm> at 1350. On February 2, 2012, Senator Eaton gave notice of an inquiry into "the interference of foreign foundations in Canada's domestic affairs and their abuse of Canada's existing Revenue Canada charitable status."

⁴ Public Safety Canada, "Harper Government confronts terrorist threats through new strategy" (9 February 2012), online: <<http://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2012/20120209-eng.aspx>>.

⁵ *Debates of the Senate*, 41st Parl, 1st Sess, Vol 148 (28 February 2012), online: <http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/054db_2012-02-28-e.htm> at 1710.

Senator Eaton's comments, coupled with the federal government's Counter-terrorism Strategy, which cited the threat of domestic issue-based extremism as including "the promotion of various causes such as animal rights, white supremacy, environmentalism and anti-capitalism,"⁶ added to the sector's perception of federal government bias.⁷

The subsequent implementation of Budget 2012, to amend the *Income Tax Act's* ("ITA") provisions related to registered charities' political activities and introduce requirements for registered charities to disclose foreign funding, added more fuel to the fire.⁸ In fact, Budget 2012 made specific reference to recent concerns being "raised that some charities may not be respecting the rules regarding political activities" and "calls for greater public transparency related to the political activities of charities, including the extent to which they may be funded by foreign sources."⁹ Since then proponents on all sides of the debate, i.e. politicians, academics, members of the sector, the legal community, and the media, have taken up arms — lobbing accusations and formulating various theories of how the political activities of registered charities have come to be a focus of CRA's charitable compliance activities, creating an unfortunate chill across the sector.¹⁰

C. PRE-BUDGET 2012 CLIMATE

In sorting through fact from fiction, it is important to point out the role of different parts of the federal bureaucracy. The Department of Finance Canada ("Finance") is responsible for preparing the budget and developing tax policy and legislation in accordance with the federal government of the day's agenda.¹¹ CRA is tasked with "supporting the administration and enforcement of the program legislation,"

⁶ Government of Canada, *Building Resilience Against Terrorism: Canada's Counter-terrorism Strategy* (February 2012), online: <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsln-c-gnst-trrrsm/rsln-c-gnst-trrrsm-eng.pdf>> at 9.

⁷ See e.g. Marcel Lauzière, "Don't fence in Canada's charities: Modern philanthropy is increasingly global in its activities and funding" *The Toronto Star* (15 March 2012); Charles Lewis, "Faith and politics not separate, United Church tells Conservative senator" *National Post* (21 June 2012); Robert B. Hayhoe, "US Non-Profits Funding Advocacy in Canada" *Charities and Not-for-Profit Newsletter* (February 2012); Terrance S. Carter and Nancy E. Claridge, "Canada's Counter-Terrorism Strategy Targets Environmentalism" *Anti-Terrorism & Charity Law Alert* (30 May 2012).

⁸ *Supra* note 2.

⁹ The Honourable James M. Flaherty, Minister of Finance, *Jobs, Growth, and Long-Term Prosperity: Economic Action Plan 2012*, tabled in the House of Commons (29 March 2012), online: <<http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf>> at 204.

¹⁰ The recent history of the debate is well documented elsewhere, see e.g. Dean Beeby, "Canadian charities feel 'chill' as tax audits widen into political activities", *The Toronto Star* (10 July 2014); Jack M. Mintz, "CRA has been charitable", *Financial Post* (15 October 2014); Gareth Kirby, *An Uncharitable Chill: A Critical Exploration of How Changes in Federal Policy and Political Climate are Affecting Advocacy-Oriented Charities* (M.A., Royal Roads University, 2014), online: http://garethkirby.ca/wp-content/uploads/2014/08/G-Kirby_UncharitableChill_ThesisPublicV.pdf.

¹¹ "About the Department of Finance Canada" (10 October 2008), online: Department of Finance Canada <<http://www.fin.gc.ca/afc/index-eng.asp>>.

including the ITA provisions related to registered charities.¹² The federal government for its part, i.e., the elected politicians forming the government, has chosen to regulate the political activities of registered charities under the ITA for three decades. Registered charities have had legislative authority to carry out limited political activities beginning with the 1985 tax year and the introduction of subsections 149.1(6.1) and (6.2) of the ITA. These original amendments to the ITA were described by the federal government at the time of their introduction as “a relieving measure” and served to “clarify that registered charities are allowed to engage in non-partisan political activities that are ancillary and incidental to their charitable purposes.”¹³

Since 1987, CRA and its predecessors have issued numerous publications, policies, and guidance, which set out its interpretation of the ITA’s political activities provisions and reflect what Canadian courts have said about registered charities’ political activities.¹⁴ These policies have not always been well received. For example, one commentator in 2002 described the then current law and administrative policies as frustrating and confusing, with the latter causing “an element of fear” amongst charities “because the stakes are very high,” i.e. the potential for revocation of registered charity status.¹⁵ However, in 2003, CRA released its still current Policy Statement CPS-022, *Political Activities* (“CPS-022”) after extensive consultations with the sector.¹⁶ Although a thorough review of CPS-022 and the circumstances leading up to these sector consultations is beyond the scope of this Bulletin, the consensus at the time was that the policy was generally well received.¹⁷ In fact, there appears to have been only one

¹² *Canada Revenue Agency Act*, SC 1999, c 17 s 5.

¹³ The Honourable Michael H. Wilson, Minister of Finance, *Securing Economic Renewal: Budget Papers*, tabled in the House of Commons (23 May 1985), online: <<http://www.budget.gc.ca/pdfarch/1985-pap-eng.pdf>> (“The proposed change recognizes that ancillary and incidental advocacy activities in support of its charitable goals are an appropriate use of a charity’s resources. These include activities such as advertising, rental of facilities or mailings to influence public opinion towards the organization’s views on public policy matters related to its charitable purposes. However, activities of a purely partisan nature such as supporting or opposing a political party or candidate would not be permitted.”) at 59.

¹⁴ See e.g. IC87-1, *Registered Charities—Ancillary and Incidental Political Activities* (25 February 1987) [Cancelled]; *Registered Charities Newsletter—Summer 1996, No. 6*, online: <<http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-06/news6-e.html>>.

¹⁵ Richard Bridge, “The Law Governing Advocacy for Charitable Organizations: The Case for Change” Vol 17, No 2 *The Philanthropist* (2002), online: <<http://thephilanthropist.ca/index.php/phil/article/view/83/83>> at 13.

¹⁶ Policy Statement CPS-022, *Political Activities* (2 September 2003), online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plyc/cps/cps-022-eng.html>>.

¹⁷ See e.g. Arthur B.C. Drache, CM, QC, “NGOs and Political Activity: The Canadian Rules” in International Center for Not-for-Profit Law, “Political Activities of NGOs: International Law and Best Practices” (November 2009) 12 *The International Journal of Not-for-Profit Law* 10, online: <http://www.icnl.org/research/journal/vol12iss1/ijnl_vol12iss1.pdf> (“The rules are primarily administrative but as we have noted, CPS-022 offers wide-ranging guidance and also shows that within the statutory limits, the Canadian government wants to allow a fair level of political activity. On a subjective note, I might add that while there was a period where the sector chafed under rules which were not clear, the major problems of determining what can and cannot be done have mostly disappeared in Canada with the publication of CPS-022.”) at 19.

case on political activities in the courts since CPS-022 was released.¹⁸ The absence of cases has previously been cited to suggest CPS-022 “has achieved a balanced approach in addressing ... [the political activities] debate in Canada.”¹⁹ Perhaps even more telling, is that CPS-022 has not been substantially changed in response to the Budget 2012 amendments.

D. BUDGET 2012 AMENDMENTS

The Budget 2012 amendments to the ITA were introduced “to ensure that charities devote their resources primarily to charitable, rather than political, activities, and to enhance public transparency and accountability.”²⁰ It is important to note that these amendments did not result in significant changes to the political activities rules, i.e., subsections 149.1(6.1) and (6.2) were not amended. Rather, the definition of “political activities” was added to subsection 149.1(1) to include gifts from one registered charity to another when the purpose of the gift may reasonably be considered to support the political activities of the recipient registered charity. The definition of “charitable purposes” in subsection 149.1(1) was expanded to prevent gifts that further political activities from counting as a charitable purpose.²¹ The amendments also empowered the Minister to suspend a registered charity’s receipting privileges for a one year period for failing to report information on its Form T3010, *Registered Charity Information Return* or for excessive political activities, i.e., the use of more than 10% of its resources.²²

E. ADDITIONAL BUDGET 2012 INITIATIVES

Budget 2012 included an \$8 million funding commitment (which has now been expanded to a \$13.1 million commitment)²³ from the federal government, which directed CRA to “[e]nhance its education and compliance activities with respect to political activities by charities” and “[i]mprove transparency

¹⁸ *News to you Canada v MNR*, 2011 FCA 192 (CanLII). (The FCA held that a recent Australian case which expanded the scope of acceptable political activities in Australia did not apply in Canada given the “express limits in subsections 149.1(6.1) and (6.2) regarding the conduct of political activities by a charity”) at paras 28-29.

¹⁹ Terrance S. Carter & Theresa L.M. Man, “Charities Speaking Out: The Evolution of Advocacy and Political Activities by Charities in Canada” (Paper delivered at the New York University National Center on Philanthropy and the Law’s Nonprofit Speech in the 21st Century: Time for a Change? Conference, New York, NY, 29 October 2010), online: <<http://www1.law.nyu.edu/ncpl/resources/documents/TCarterpaperformatted.pdf>> (See the discussion at pages 27-42 for a thorough review of CPS-022) at 54.

²⁰ *Supra* note 9 at 189.

²¹ Additional minor amendments were made to subsections 149.1(6) and (10).

²² See paragraphs (e), (f), and (g) of subsection 188.2(2) and subsection 188.1(2.1) of the ITA.

²³ October 21, 2014 Sessional Paper obtained and distributed by Imagine Canada on January 26, 2015, Part d(i), online: <<http://www.imaginecanada.ca/sites/default/files/8555-412-761.pdf>>.

by requiring charities to provide more information on their political activities, including the extent to which these are funded by foreign sources.”²⁴

Budget 2012 also connected these transparency and accountability measures to the previously mentioned Standing Committee study, as initiated by the federal government.²⁵ These two factors are noteworthy insofar as they indicate CRA did not initiate the political activities compliance program, but was directed to do so by the federal government. In particular, the information CRA has publicly provided prior to²⁶ and during its implementation of the Budget 2012 initiatives stated that it had not received any political interference concerning how it is to carry out those initiatives.

F. CRA’S IMPLEMENTATION OF BUDGET 2012 INITIATIVES

CRA’s implementation of the Budget 2012 initiatives has resulted in a mix of educational measures and increased compliance activities by the Charities Directorate.²⁷ For example, CRA has established a team in the Charities Directorate’s “Compliance Division to carry out audits that focus specifically on political activities”²⁸ and developed web based resources including a self-assessment tool, a series of short videos, and an online list of questions and answers.²⁹ However, it is the increase in compliance activities that is drawing the most attention from the press and the sector. In this regard, Cathy Hawara, the Director General of the Charities Directorate of CRA, made the following statements concerning how its compliance activities are carried out:

...the Charities program is managed in a fair and impartial manner, without political direction as to which charities should or should not be subjected to review and audit. This is critical to our role as a credible and effective regulator of

²⁴ *Supra* note 9 at 205.

²⁵ *Ibid* at 204.

²⁶ See e.g. the testimony of Cathy Hawara, Director General of CRA’s Charities Directorate before the Standing Committee. When asked whether CRA receives “instructions on which charities you have to investigate?” Ms. Hawara responded, “No, we don’t receive instructions like that...The audit plan is developed each year by the charities directorate. We then have the opportunity to review the complaints we receive from the public...So we are developing a balanced program with several components, including high-risk files, meaning abusive tax shelters and false receipts. We are also able to review the complaints we receive, but this all falls under the charities directorate.” Standing Committee on Finance, Evidence, 41st Parl, 1st Sess, No 38 (31 January 2012), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5347871&File=0>> at 1610.

²⁷ For a detailed description of the Charities Directorate’s educational activities, changes to forms and publications, statistics on its compliance activities, and how it selects files for its political activities audits, see CRA, “Charities Program Update – 2014” (26 February 2014), online: http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/chrtsprgrm_pdt-2014-eng.html.

²⁸ Cathy Hawara, Director General of CRA’s Charities Directorate, (Speech delivered at the Canadian Bar Association’s National Charity Law Symposium, 10 May 2013), online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/lwsympsm-eng.html>>.

²⁹ Available online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/menu-eng.html>.

the charitable sector. CRA employees act with the utmost integrity and professionalism in carrying out their responsibilities to administer and apply the provisions of the *Income Tax Act* that relate to registered charities.³⁰

We recognize the need to be as transparent and accountable as possible about how we administer our program. This doesn't come as a surprise to us. When we began implementing the measures announced in Budget 2012, we were very deliberate in articulating our framework and the underlying principles related to our compliance program – we were going to stay true to those principles as we embarked on our work related to political activities. As I have made clear in the past, the process for identifying which charities will be audited (for any reason) is handled by the Directorate itself and is not subject to political direction.³¹

In addition to CRA's public statements, the current Minister, whose responsibility for CRA is set out in the *Canada Revenue Agency Act*,³² has recently provided statistical information concerning the number of political activities audits to be undertaken. In particular, the Minister advised that:

As a result of Budget 2012, the CRA will conduct 60 audits related to the political activities of charities over a four year period. As of October 21, 2014 [...] 40 political activity audits were underway (this includes some which commenced prior to Budget 2012). Of these audits, 13 have been completed.³³

The Minister's statistical information also revealed that the number of formal complaints regarding the political activities of registered charities spiked from under 27 a year in 2008-2009, 2009-2010, and 2010-2011 to 139 in 2011-2012 and 159 in 2012-2013.³⁴ This more than fivefold increase in formal complaints occurring over the 2011-2012 period indicates the increased interest in political activities by the public likely resulted from the statements of federal government representatives in the period leading up to Budget 2012, rather than from a pre-existing public concern requiring a legislative remedy. As such, these statistics underscore the fact that prior to Budget 2012 the political activities of registered charities were not high on the public's radar, which, in turn, suggests that the controversy over political activities has been a construct of the federal government, as opposed to a CRA initiative or government response to public outcry.

³⁰ *Supra* note 28.

³¹ Cathy Hawara, Director General of CRA's Charities Directorate, (Speech delivered at the Canadian Bar Association's National Charity Law Symposium, 23 May 2014), online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/2014-lwsympsm-eng.html>>.

³² *Supra* note 12, ss 6(2).

³³ *Supra* note 23.

³⁴ *Ibid.*

G. CONCLUSION

Although the legislative framework and regulatory history relating to the political activities of registered charities is longstanding, public comments by various representatives of the federal government prior to the implementation of Budget 2012 have contributed to the current climate of fear surrounding political activities. In this regard, it is important to differentiate between the political manoeuvrings of those who created the current climate and those tasked with undertaking the administration and enforcement of the Budget 2012 initiatives. As well, CRA itself is effectively absent from the debate, due in large part to the confidentiality provisions of the ITA, which prevent CRA officials from disclosing taxpayer information except in certain circumstances.³⁵

Despite the stated importance of charities needing to be part of public policy debate in Canada,³⁶ the federal government's unjustified allegations in recent years about charities purportedly misusing their statutory right to participate in political activities, fewer charities are prepared to enter the risky arena of political activities. This is a regrettable development notwithstanding CRA's recent efforts at providing educational resources about what registered charities can do with regard to political activities. In trying to separate fact from fiction concerning the debate about political activities by charities over the last three years, the facts point back to the unwarranted allegations made by the federal government on an issue which for almost 10 years had been a topic of little, if any, discussion or debate within the sector, the public, or CRA.

³⁵ Section 241 of the ITA sets out the circumstances under which CRA officials can disclose information about registered charities.

³⁶ *Supra* note 16 at section 2.